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January 26, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992
MM Docket 92-266

Dear Ms. Searcy:

Submitted herewith for filing are the original and 9 copies of the Comments of Dade County, Florida in the above-referenced proceedings.

Respectfully submitted,

Thomas W. Logue
Assistant County Attorney

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92-544

In the Matter of	)	
	)	MM Docket 92-266
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	
Rate Regulation	)	

COMMENTS OF METROPOLITAN DADE COUNTY, FLORIDA CONCERNING PROPOSED RULE MAKING

1. Metropolitan Dade County, Florida, submits the following Comments in the above referenced Rulemaking.

I. THE FCC'S OBLIGATION TO SUBSCRIBERS TO "ENSURE THAT THE RATES FOR THE BASIC SERVICE TIER ARE REASONABLE" REQUIRES THAT THE FCC MAINTAIN JURISDICTION TO REGULATE RATES FOR BASIC SERVICE UNLESS AND UNTIL A LOCAL FRANCHISING AUTHORITY IS CERTIFIED TO REGULATE BASIC RATES IN THAT GEOGRAPHIC AREA.

2. The proposed rulemaking suggests that the FCC has no authority to ensure that the rates for basic service are reasonable until the local franchising authority applies for certification and this certification is disallowed or revoked by the FCC. The rulemaking states,

> We tentatively conclude that we have the power to regulate basic cable service rates only if we have disallowed or revoked the franchise authority's certification. . . . Thus, it appears that, unless a local authority seeks to assert regulatory jurisdiction over basic cable service, we would have no independent authority to initiate regulation of basic service rates.

Rulemaking, 11-12, para. 15. The tentative conclusion would leave cable subscribers without regulatory protection concerning

basic service unless and until the local franchising authority acted. Under this scenario, the local franchising authority becomes the final decision maker as to whether subscribers would be protected from unreasonable rates for basic service. Protecting subscribers from unreasonable rates for basic cable, however, is a federal policy, adopted by Congress. Moreover, Congress specifically stated that the FCC had an independent responsibility to "ensure that the rates for the basic service tier are reasonable." Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (hereinafter "Cable Act of 1992") section 3 (a) (b) (1); 47 U.S.C. section 543 (b) (1).

3. The main problem with the FCC's tentative conclusion is that many franchising authorities will never apply for certification. Local franchising authorities will fail to apply for certification for different reasons, including mistake; ignorance; lack of personnel, resources, and expertise; assumptions that the FCC is better able to address the problem; assumptions that the FCC is already dealing with the problem; or philosophical disagreement with the Congressional purposes reflected in the Cable Act of 1992. Congress, however, intended subscribers to be protected whether or not local governments participate.

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4. In no uncertain terms, Congress declared its policy to protect subscribers in this regard:

> STATEMENT OF POLICY. - It is the policy of Congress in this Act to -
>
> * * *
>
> (4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service; and
>
> (5) ensure that cable television operators do not have undue market power vis-a-vis ... consumers.

Cable Act of 1992, section 2 (b). This policy was based on explicit findings that cable is the "dominant" nationwide video medium; that there exists "undue market power for the cable operator as compared to that of consumers . . .;" and that cable rates have "increased almost 3 times as much as the consumer Price Index since rate deregulation." Id. section 2 (a) (1), (2). Nothing in these findings suggests that rates for basic tier service are to receive less FCC protections than rates for other types of service, or that the Federal Policy will only be implemented if the local franchising authorities elect to participate.

5. Indeed, Congress explicitly stated that the FCC has an independent responsibility to protect subscribers from unreasonable rates for basic service. Congress stated:

> (1) COMMISSION OBLIGATION TO SUBSCRIBERS. - The Commission shall, by regulation, ensure that the rates for the basic tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates

> for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

Cable Act of 1992, section 3 (b); 47 U.S.C. section 543 (b) (emphasis added). This provision squarely places an independent responsibility for ensuring compliance with the Congressional mandate for reasonable rates for basic service on the Commission - regardless of the approval or participation of the local franchising authorities.

6. Thus, the Cable Act of 1992 created a national, federal policy to "ensure that rates for the basic tier are reasonable." Id. If this Congressional policy is to apply to all subscribers in the nation, then, at any given time, either the local franchising authority or the FCC must have the jurisdiction to regulate rates for basic services. The subscriber should be able to look for protection to either the FCC or to the local franchising authority. No instances should be allowed where the FCC has no jurisdiction to protect the subscriber and the local franchising authority has no jurisdiction to protect the subscriber. A regulation allowing such instances would leave the subscribers "at the mercy of the cable operator's market power," which Congress specifically intended to avoid. S.Rep. No. 102-92, 102 Cong., 2d sess. 8 (1992).

7. The tentative conclusion would allow exactly this type of situation. The Congressional policy would take force and effect if and only if approved and ratified by the local franchising authority in the form of an application for

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certification. Under the tentative conclusion, if the local franchising authority fails to apply for certification, no one would have jurisdiction to protect the subscriber. Such a result is contrary to the Congressional scheme and must be rejected.

8. In general, to fulfill the Congressional purpose, the regulations must provide that jurisdiction to ensure reasonable basic rates will, at any given time, rest in either the FCC or the local franchising authority. The jurisdiction to protect the consumer should not be left out in Limbo. The obvious method to accomplish this end would be for the FCC to assert and retain jurisdiction to ensure reasonable rates for basic service unless and until a local franchising authority is certified to so regulate. This approach increases the options available to local franchising authorities while not compromising protections for subscribers. It would allow a local franchising authority to act as the regulatory body or to appear as a party in a proceeding in which the FCC is the regulatory body. Any other approach would leave gaps in the jurisdiction such that neither the FCC nor the local franchising authority has the power to advance the federal policy.

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II. THE RULEMAKING SHOULD INTERPRET THE CABLE ACT OF 1992 AS INDEPENDENTLY AUTHORIZING A FRANCHISING AUTHORITY TO REGULATE RATES FOR BASIC SERVICE EXCEPT WHERE STATE LAW HAS EXCLUSIVELY TRANSFERRED THAT POWER TO ANOTHER GOVERNMENTAL ENTITY AND THAT OTHER ENTITY HAS APPLIED FOR AND BEEN CERTIFIED TO REGULATE RATES BY THE FCC.

9. The Proposed Rulemaking requests comments on the issue "whether franchising authorities derive their powers to regulate from state and local laws alone, or whether the Cable Act may itself be an independent source of authority to regulate rates." Rulemaking, para. 20, at 15. To ensure the maximum fulfillment of the Congressional policy, the Rulemaking should interpret the Cable Act of 1992 as creating an independent source of authority for local franchising authorities to regulate rates.

10. When local franchising authorities exercise the authority to regulate rates for basic services, they will be exercising that authority to advance a federal, national policy announced by Congress - namely protection of cable subscribers from unreasonable rates for basic services. This goal may or may not be the policy of the State where the local franchising authority is located. In addition, the regulation of basic rates by local franchising authorities will be controlled by federal statutes and by federal regulations promulgated by the FCC -- not by local laws. Indeed, it is an act of the FCC, in granting certification, that empowers the local franchising authority to regulate rates. The FCC has the power to rescind that authority in certain circumstances.

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11. The local franchising authority's power to regulate rates is narrowly tailored to advance only the announced federal objective, and leaves no room for the local franchising authority to advance other, state objectives -- such as protecting subscribers from unreasonable rates for other programming services. The local franchising authority is acting like an agent of the federal government, under the control of the federal government, to accomplish a federal objective. In such circumstances, it is reasonable to hold that the local franchising authorities power to regulate rates for basic services stems from the federal legislation.

12. This interpretation is in accord with the legislative history of the Cable Act of 1992, which indicates that the Cable Act will operate to preempt and abrogate state and local law to permit rate regulation consistent with federal law and regulations. See, Rulemaking, para. 20, at 15. The House Report specifically envisioned such a result when it announced that "the Committee intends that, as a matter of federal law, except as provided in Subsection 3 (j) all franchising authorities, regardless of the provisions in a franchise agreement, shall have the right to regulate basic cable services rates if they meet the conditions in section 623 (a) (4)." House Report at 81 (emphasis added). The House obviously intended that the power to regulate basic rates be conferred "as a matter of federal law." The House interpretation should govern since the final bill used the House language on this point.

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13. Moreover, this interpretation increases the overall resources available to accomplish the Congressional goal because it would ensure that the maximum number of local franchising authorities would qualify for certification. More certified local franchising authorities means more resources dedicated to accomplishing the federal policy.

14. Such an approach also protects the limited resources of the FCC. The ultimate responsibility for implementation of the federal policy is squarely placed on the FCC: "[t]he Commission shall, by regulation, ensure that the rates for the basic tier are reasonable." Cable Act of 1992, section 3 (b); 47 U.S.C. section 543 (b). The Statutory scheme, however, clearly envisions that the FCC will draw upon the assistance of those local franchising authorities ready and willing to abide by the Congressional and FCC regulations. The more local franchising authorities certified to regulate rates means that more of the burden of regulation is shifted from the FCC to local franchising authorities. Preserving the limited resources of the FCC is important for many reasons, including the fact that the FCC has a crucial role to play in deciding appeals by cable operators of basic rate regulation promulgated by local franchising authorities.

15. Finally, this interpretation will allow most rate regulation enforcement to occur at the local level. Congress obviously intended that this result. Rate regulation depends on many local factors and should be handled, where possible, by local franchising authorities. The Proposed Rulemaking

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acknowledges this fact when it stated, for example "enforcement of cable regulation should occur at the local level," and "[w]hen franchising authorities regulate rates for basic cable service consistent with the Act, they would be in the best position to monitor an operator's compliance with our [the FCC's] rate regulation." Proposed Rulemaking, para. 86, at 44.

16. This analysis also answers the question raised in the Proposed Rulemaking concerning the meaning of section 623 (a) (3) (B), which requires a local franchising authority requesting certification to affirm that it has "legal authority" to regulate rates. If the 1992 Cable Act is interpreted as providing an independent source of the local franchising authority's power to regulate, then section 623 (a) (3) (B) provides a vehicle to ensure that the local franchising authority is matched to the proper geographic area.

17. It also provides a method to resolve other jurisdictional conflicts. Consider, for example, the circumstances where state law provides that cable rate regulation jurisdiction will reside exclusively in a state-wide agency rather than individual municipalities. In that case, the federal law should be interpreted to transfer jurisdiction to only that statewide body, when and if it is shown that state law so operates and that the statewide body is certified by the FCC.

18. This last requirement is crucial. If State law is allowed to deny an otherwise ready and willing local franchising authority the ability to regulate basic rates under the Congressional scheme when no other local franchising authority is

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ready to act in its place, then the federal Congressional scheme will suffer. Resources to accomplish the Congressional goal are lessened and the FCC will have to dedicate some of its limited resources to fill in the void left by lack of local enforcement.

III. THE RULEMAKING PROPERLY CONCLUDES THAT CONGRESS INTENDED TO SEPARATE RATES FOR EQUIPMENT AND INSTALLATION FROM OTHER BASIC TIER RATES.

19. Dade County endorses and supports the tentative conclusions contained in paragraph 63 of the proposed Rulemaking. The market power of the cable operators creates the potential for abuse of the equipment and installation charges. For example, in Dade County one cable operator charges $42.00 for installation if the subscriber purchases a full package of services, but charges $104.95 if the subscriber purchases only basic. This type of manipulation of installation charges to force subscribers to purchase more services should be controlled.

IV. SUBSCRIBERS SHOULD BE PERMITTED, BUT NOT REQUIRED, TO OBTAIN A FRANCHISING AUTHORITY'S CONCURRENCE AS A PRECONDITION TO THE FILING OF A RATE REGULATION COMPLAINT.

20. The Cable Act of 1992 clearly indicates that consumer should be able to prosecute their complaints whether or not the local franchising authority is willing to participate. It requires the FCC to establish "fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any subscriber, franchising authority, or other relevant State or local government entity. . . ." The use of the disjunctive "or" indicates that the subscriber's right to have its claim reviewed by the FCC is independent of the franchising authority's right.

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This conclusion is underscored by the reality that some local franchising authorities may not have the resources to assist a particular consumer who wishes to file a complaint. In such circumstances, the consumer should not be penalized, and his claim denied any consideration by the FCC, merely because of a failure on the part of a local franchising authority.

V. THE TIME LIMIT FOR FILING COMPLAINTS SHOULD BE 90 DAYS (NOT 30 DAYS) FROM THE DATE OF THE BILL (NOT THE DATE OF THE INITIAL NOTICE).

21. The Rulemaking tentatively proposes that the time limit for filing complaints should be 30 days from the date of the first notice of a rate increase. In the first place, the time limit should run from the date of receipt of the actual bill which charges the increased rate, not from the notice. Notice of rate increases are most often sent as bill inserts along with advertisements. Consumers often treat such inserts as junk mail which is discarded without reading. Thus, for the overwhelming majority of subscribers, the first actual notice of a rate increase occurs when they receive the bill charging for the rate increase. In fact, in Dade County, most complaints about rate increases occur when the bill is received, not when the first notice goes out. For this reason, the time limit should run from the date of the bill, not from the notice, which is often confused for junk mail and not read.

22. Secondly, the FCC should allow at least 90 days for a consumer to file its complaint. This period more realistically allows the consumer to gather information, decide whether to

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file, to learn how and where to file, to prepare and document his or her complaint, and to deliver the complaint to the FCC.

23. Many consumers will be contacting the FCC and local franchising authorities for information on how and where to file a complaint. The 90 day limit would allow the FCC and local franchising authorities to respond to such requests for information in a methodical and deliberate way, including by mailing prepared packets of materials. The 30 day limit would require all such request for information to be answered on a "rush" basis, mainly by telephone. This wastes the time and resources of the FCC and local franchising authorities. Also, such "rush" complaints will undoubtedly be less well documented and prepared than complaints where the subscriber has more time, and will therefore be more time-consuming for the FCC in making its response.

24. For these reasons, to ensure that the right to make a complaint is meaningful, the time limit for filing should be 90 days and it should run from the date of the bill charging the rate increase.

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VI. THE RULEMAKING SHOULD REQUIRE THAT THE SUBSCRIBER'S BILL CLEARLY DELINEATE THE OVERALL CABLE RATE, WHICH INCLUDES ANY ITEMIZED SUB-CATEGORIES COMPRISING THE OVERALL RATE, AND THAT SUCH ITEMIZED SUB-CATEGORIES CANNOT NOT BE BILLED SEPARATELY.

25. The Cable Act of 1992 authorizes cable operators to itemize on subscriber bills various government-related expenses, such as the franchise fee, public access support charges, and any taxes. The obvious intent of this provision was to allow cable operators to inform their subscribers of the portion of their cable bill attributable to government-related expenses. The Rulemaking should make clear, however, that itemization should not be allowed, either intentionally or inadvertently, to confuse the subscriber about the amount of the cable rate.

26. The potential for confusion is very large in this area. Some Cable Operators use this provision as a justification for reporting to potential subscribers, newspapers, and government regulatory entities that their "cable rate" is the amount of the bill, except for the itemized amount attribute to government-related expense. This practice serves to under-report the actual "cable rate" charged to the customer. It misleads consumers, the public, and the regulators.

27. For example, in Dade County one cable operator informs the media, and potential subscribers that its cable rate is $23.95. On its bill it states that the "cable rate" is $23.95. But the cable operator separately bills additional amounts for franchise fees, and copyright fees, and a mandatory converter fee

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so that the actual rate paid by the subscriber is $28.38. The cable operator manipulates the numbers to hide its real cable rate.

28. The touchstone for the regulations in this area must be the avoidance of confusion to the customer. The rulemaking should provide that there is only one "cable rate" charged to the subscriber and that rate includes all of the sub-categories that may be itemized. At the Proposed Rulemaking accurately points out, "Congress explicitly intended that such cost be itemized as part of the total bill, but not separately billed." Proposed Rulemaking, para. 175 at 79 (citing House Report at 86).

Respectfully submitted,

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